

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF OWNERSHIP AND ALLEGED)
ABANDONMENT OF PROOF OF APPROPRIATION)
04722, PERMIT 2486, CERTIFICATE 258,)
AND PERMIT 2710, CERTIFICATE 259,)
OSCEOLA MINING DISTRICT, WHITE PINE)
COUNTY, NEVADA.)

RULING

3898

GENERAL

I.

Proof of Appropriation 04722 was filed by Pony Express Mining & Milling, Inc. on November 9, 1988, claiming to have appropriated the waters of Horse Canyon Creek for mining and milling purposes, claiming a prestatutory water right dating back to 1885.¹

Permit 2486 was approved on October 22, 1912, and certificated on February 9, 1915, under Certificate 258, appropriating the waters of Ohio Springs for mining, milling and domestic purposes.² The owner of record is C.A. Dunham.

Permit 2710 was approved on January 7, 1914, and certificated on February 9, 1915, under Certificate 259, appropriating the waters of Cold Spring for mining, milling and domestic purposes.³ The owner of record is Pony Express Mining and Milling Co., which is not the same as Pony Express Mining and Milling, Inc., which filed Proof of Appropriation 04722.

II.

On May 29, 1990, Robert L. Harbecke notified the State Engineer that he felt the claimant of Proof 04722, Mr. Fred Salisbury, was taking Horse Canyon Creek water to which he is not

1 Exhibit 3, Public Administrative Hearing before the State Engineer, January 15, 1992.

2 Exhibit 4, Public Administrative Hearing before the State Engineer, January 15, 1992.

3 Exhibit 5, Public Administrative Hearing before the State Engineer, January 15, 1992.

entitled.⁴ In addition Mr. Harbecke objected to Mr. Salisbury's use of water out of Ohio Springs. Mr. Harbecke felt that Mr. Salisbury did not own the water rights from these sources and he felt that these water rights had been abandoned or forfeited.⁵

III.

A public administrative hearing was held on January 15, 1992, to consider the ownership of Proof 04722, Permit 2486, Certificate 258, and Permit 2710, Certificate 259, and to consider whether these water rights had been abandoned or forfeited.

FINDINGS OF FACT

I.

The water rights described under Proof 04722, Permit 2486, Certificate 258, and Permit 2710, Certificate 259 are appurtenant to patented mining claims (Pony Express and Gracie Patented Mining Claims Mineral Survey No. 4012).⁶ These mining claims are presently owned by the McMillin Family and the Gemini Exploration and Mining Co.⁷ A chain of title for Proof of Appropriation 04722, Permit 2486, Certificate 258 and Permit 2710, Certificate 259 has not been submitted. Therefore, the State Engineer can make no finding as to the current legal owner of these water rights.

Mr. Fred Salisbury, owner of the current Pony Express Mining Co., had verbal permission and later, a lease-option agreement with the McMillin family to work these claims and to use any

4 Exhibit 2, Public Administrative Hearing before the State Engineer, January 15, 1992.

5 Post Hearing Brief Filed on behalf of Robert L. Harbecke.

6 Exhibits 3, 6, 7, and P 4, Public Administrative Hearing before the State Engineer, January 15, 1992.

7 Transcript p. 165, Public Administrative Hearing before the State Engineer, January 15, 1992.

water appurtenant to these claims.⁸ Mr. Salisbury provided evidence indicating that he exercised that option.⁹ Mr. Harbecke contended that the option agreement is defunct at the present time.¹⁰ This issue is the subject of a pending law suit filed by the McMillins.¹¹ The State Engineer makes no finding as to the validity of the agreements between Fred Salisbury and the McMillin Family.

II.

The Nevada Supreme Court provides guidance on the distinctions between abandonment and forfeiture.¹² The Court held that abandonment is a voluntary matter, the relinquishment of a water right by the owner with the intention of forsaking and deserting it. Forfeiture, on the other hand, is the involuntary or forced loss of a water right caused by failure of the holder to utilize the resource for the time fixed by statute. The Court further held that the statutory forfeiture procedure did not apply to water rights vested prior to the enactment of the 1913 water law.

Both the relinquishment of possession and the intent are necessary in order to make a finding of abandonment. Mere non-use of the water, without substantial evidence of intent to abandon and to relinquish possession, is not sufficient for a finding of abandonment.

⁸ Transcript p. 31 and Exhibit P 10, Public Administrative Hearing before the State Engineer, January 15, 1992.

⁹ Exhibit P 11, Public Administrative Hearing before the State Engineer, January 15, 1992.

¹⁰ Exhibit H 7, Public Administrative Hearing before the State Engineer, January 15, 1992.

¹¹ Exhibit H 17, Public Administrative Hearing before the State Engineer, January 15, 1992.

¹² In re Waters of Manse Spring and its Tributaries, 60 Nev. 280, 108 P.2d 311 (1940).

III.

Mr. Harbecke asserts that the water rights from Horse Canyon Creek (Proof 04722), Ohio Springs (Permit 2486, Certificate 258) and Cold Spring (Permit 2710, Certificate 259) have been abandoned.¹³ Witnesses for Mr. Harbecke saw no evidence of water use during the time they were sporadically in the area during the years between 1915 and 1992. They also testified that they observed no water line in or around the Osceola Ditch.¹⁴

Mr. Salisbury testified that he found the old water line from Ohio Springs, Cold Springs, and Horse Canyon to the area of the Gracie/Pony Express Patents. He observed water flowing in the pipeline.¹⁵ Mr. Salisbury submitted Ore Sale Receipts¹⁶ from the Mary Ann Mine, States Brother, and Hazel Green, all who were associated with the Gracie/Pony Express patents. No evidence was offered to show whether any water was used or not used during the time period 1943 through 1950. Mr. Salisbury testified that he knew of mining operations and water use from conversations with the individuals who held the mining claims in the period 1950 through 1980.¹⁷ Mr. Salisbury himself obtained the subject

¹³ Exhibit 2, Public Administrative Hearing before the State Engineer, January 15, 1992.

¹⁴ Transcript pp. 58-59, 62, 79 and 93, Public Administrative Hearing before the State Engineer, January 15, 1992. A portion of the old water line conveying water from Horse Canyon Creek, Ohio Springs, and Cold Spring to the Gracie/Pony Express patented mining claims followed the Osceola Ditch. (See Exhibits 6 and 7).

¹⁵ Transcript pp. 215-217, Public Administrative Hearing before the State Engineer, January 15, 1992.

¹⁶ Exhibits P 15, P16, P17, P18, P19, P20 and P21, Public Administrative Hearing before the State Engineer, January 15, 1992.

¹⁷ Transcript pp. 211-215, Public Administrative Hearing before the State Engineer, January 15, 1992.

mining claims around 1980, repaired or replaced the water lines, and put the water to beneficial use.¹⁸ These activities took place prior to 1990 when Mr. Harbecke brought his charges of abandonment.

The State Engineer finds that mining activity and water use occurred throughout the years and that Mr. Harbecke has failed to demonstrate an intent to abandon the water rights at issue here.

In a recent case,¹⁹ the Nevada Supreme court ruled that substantial use of water after the statutory period of non-use, but before the forfeiture action begins, "cures" the forfeiture. If the water rights at issue here were eligible for forfeiture, then Mr. Salisbury "cured" the forfeiture when he put the waters to beneficial use prior to May 29, 1990, the date Mr. Harbecke brought his charges to the State Engineer. The State Engineer finds that there is no forfeiture of water rights in this case.

CONCLUSIONS

I.

The State Engineer has jurisdiction in the subject matter.²⁰

II.

The water rights identified by Proof 04722, Permit 2486, Certificate 258, and Permit 2710, Certificate 259 are appurtenant to patented lands in the Mary Ann, Gracie and Pony Express mining area. Without a complete chain of title to the original appropriators of the waters of Horse Canyon Creek, Ohio Springs and Cold Spring, no conclusion can be made as to the current owners of these water rights.

¹⁸ Transcript pp. 214, 218-219, and 220-221, Public Administrative Hearing before the State Engineer, January 15, 1992.

¹⁹ Eureka v. State Engineer, 108 Nev. ___, 826 P.2d 948 (1992).

²⁰ NRS Chapter 533.

III.

The owner of the patented mining claims had agreements with Mr. Fred Salisbury to use the property for mining activities. The State Engineer draws no conclusion regarding the validity of the agreements between Mr. Salisbury and the McMillin Family.

IV.

No evidence or testimony was offered to show an intent to abandon the water rights being considered in this action. The State Engineer concludes on the basis of the testimony and evidence submitted at this hearing, that there was no abandonment of the water rights.

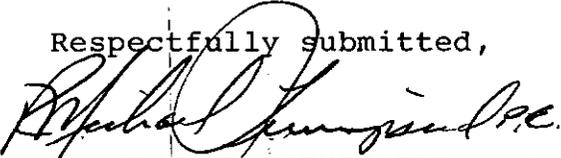
V.

No evidence or testimony was offered demonstrating that the water rights identified by Permit 2486, Certificate 258 and Permit 2710, Certificate 259 met statutory forfeiture criteria. If the water rights were forfeited, Mr. Salisbury has "cured" the forfeiture by placing the water to beneficial use prior to any forfeiture action. Therefore, the State Engineer concludes that no forfeiture shall be declared in this case.

RULING

No ruling is made as to who has the appropriate authorization to use the waters under Proof 04722, Permit 2486, Certificate 258, and Permit 2710, Certificate 259. The water rights are not declared abandoned or forfeited as a result of this hearing.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/pm

Dated this 31st day of
July, 1992.